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SUPREME COURT, U.S.
FILED
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No. 04-398

IN THE

Supreme Court of the United States

MARK GLUKOWSKY,
Petitioner,

v.

EQUITY ONE, INC.,
Respondent.

VICTOR AND ELAINE YURITCH,
Petitioners,

v.

COUNTRYWIDE HOME LOANS, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT COUNTRYWIDE HOME LOANS, INC.

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QUESTIONS PRESENTED

1. Whether review is warranted of the decision of the Supreme Court of New Jersey upholding a 1996 regulation of the Office of Thrift Supervision, promulgated under the Alternative Mortgage Transaction Parity Act of 1982, when (a) that regulation is no longer in effect, and (b) the decision below is in harmony with the decisions of the three federal courts to have considered the validity of the regulation.

2. Whether, not having raised the issue in a timely fashion in the New Jersey Supreme Court and that Court not having addressed the issue, petitioners have failed to preserve for review the question whether a conflict exists between the Alternative Mortgage Transaction Parity Act and another federal law, the Depository Institutions Deregulation and Monetary Control Act of 1980.

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STATEMENT OF THE CASE

1. Petitioners and respondents entered into mortgage loan agreements that, under certain circumstances, required petitioners to pay a penalty if the loan was prepaid. Petitioners prepaid their loans, paid the prepayment penalty amounts without protest, and then sued respondents in New Jersey Superior Court. Petitioners claimed that the prepayment provisions in their agreements were unlawful under New Jersey statutes and an administrative regulation. The trial courts in each case dismissed the complaints, on the ground that the New Jersey restrictions on prepayment penalties were preempted by a regulation issued by the Office of Thrift Supervision ("the OTS") under the Alternative Mortgage Transaction Parity Act, 12 U.S.C. §§ 3801 *et seq.* ("the Parity Act").

The Parity Act was enacted in 1982 with the stated intent of encouraging the making of alternative mortgage transactions, such as adjustable rate loans, which Congress found to be "essential to the provision of an adequate supply of credit." 12 U.S.C. § 3801. The Parity Act accomplished that purpose by putting state-regulated mortgage lenders on the same footing with federally regulated entities, allowing those lenders to make alternative mortgage loans under applicable federal rules and preempting contrary state laws. 12 U.S.C § 3803. States were free to opt out of the Act's preemptive provisions. 12 U.S.C. § 3804. New Jersey did not opt out. Pet. 20; Pet. App. 8.

The Parity Act authorized the Federal Home Loan Bank Board (OTS's predecessor) to issue regulations that would identify the federal lending rules that would apply to state lenders, so as to achieve "parity" in lending and "prevent discrimination against" state chartered lenders offering alternative mortgages, and that would be effective "notwithstanding any State constitution, law, or regulation." 12

U.S.C. § 3803(a)(3) and (c). Exercising that authority, the OTS in 1996 adopted 12 C.F.R. § 560.220, which gave state chartered lenders the ability, on these loans, to impose prepayment penalties just as federally-chartered lenders could. See 12 C.F.R. § 560.34. That new regulation preempted contrary state laws.

Federal courts uniformly upheld § 560.220 against challenges that it was *ultra vires* under the Parity Act. *See McCarthy v. Option One Mortgage Corp.*, 362 F.3d 1008, 1010-11 (7th Cir. 2004); *Nat'l Home Equity Mortgage Ass'n v. Face*, 239 F.3d 633, 639-40 (4th Cir.), *cert. denied*, 534 U.S. 823 (2001); *Shinn v. Encore Mortgage Servs., Inc.*, 96 F. Supp. 2d 419, 424 (D.N.J. 2000).

2. On separate occasions, the Appellate Division of the Superior Court of New Jersey reversed the trial court's dismissals.[1] That court relied for its holding largely on the OTS's decision in 2002 to withdraw its 1996 regulation and return to the States their power to prohibit state chartered lenders from including prepayment penalties in alternative mortgage loan agreements. The court believed that the OTS's changed view demonstrated that its earlier regulation had been beyond its authority to issue under the Parity Act. Pet. App. 63. It reached that conclusion notwithstanding the OTS's finding that its earlier regulation was also a permissible interpretation of the Act, and that the new regulation could not be applied retroactively to loans that had already been made. *Id.* 64-65.

The Supreme Court of New Jersey reversed the Appellate Division's holdings in turn.[2] Relying on numerous

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[1] The *Glukowsky* dismissal was reversed by published opinion. Pet. App. 29-82. *Yuritch* was reversed in reliance on *Glukowsky*.

[2] As did the intermediate court, the New Jersey Supreme Court decided *Glukowsky* with a full opinion, Pet. App. 1-27, and *Yuritch* by order referencing its *Glukowsky* ruling. *Id* 28.

rulings from this Court that agencies may reexamine their policies on a continuing basis, the court accepted the OTS's position and held that it had been reasonable for the OTS to conclude in 1996 that preemption of State law bans on prepayment penalties was necessary to achieve parity between federally chartered and state chartered lenders, just as it was reasonable six years later, having by then witnessed the practical impact of its earlier view, for the OTS to reach a different conclusion. Pet. App. 20-21.

REASONS FOR DENYING THE WRIT

This case presents no issue warranting review. The question whether the 1996 OTS regulation was *ultra vires* poses no issue of continuing significance because that regulation has been withdrawn and affects only loans made before the 2002 regulation. Moreover, on the merits, the New Jersey Supreme Court correctly held that the OTS regulation was a permissible interpretation of the Parity Act, a ruling in accord with all three federal courts to have considered the issue. In addition, petitioners failed in the New Jersey Supreme Court timely to raise any issue concerning the Depository Institutions Deregulation and Monetary Control Act of 1980. Thus, the petition should be denied.

1. The question of the OTS's authority under the Parity Act to promulgate its 1996 regulation lost whatever general importance it might have had when the OTS promulgated its new regulation in 2002 that petitioners acknowledge reflects their own interpretation of the Parity Act. This case therefore has only limited historical import. Indeed, even when the intermediate New Jersey appellate court struck down the 1996 regulation, it expressly acknowledged that the retroactive application of its holding to loans already made was in serious doubt, remanding for a determination of that question and thereby further undermining the potential significance of any

dispute about the validity of the 1996 regulation. Pet. App. 81-82.

Moreover, the New Jersey Supreme Court correctly held that the OTS's 1996 regulation was a permissible interpretation of the Parity Act. Every court to have considered that issue reached the same conclusion.[3/]

The New Jersey Supreme Court also correctly held that the decision of the OTS in 2002 to withdraw that regulation did not impugn its original validity. The OTS had observed the practical effect of its earlier regulation in the years since its promulgation, and concluded that charging prepayment penalties was not necessary or desirable to achieve parity. In light of that experience and in the exercise of its ongoing duty effectively to implement the goals of the Parity Act, the agency changed its mind about the wisdom of its earlier view. This Court has recognized many times that a statute may have more than one permissible construction[4/] and that administrative agencies may properly take account of changed circumstances in the industries they regulate.[5/] Thus, as the OTS itself

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[3/] *See McCarthy v. Option One Mortgage Corp.*, 362 F.3d 1008, 1010-11 (7th Cir. 2004); *Nat'l Home Equity Mortgage Ass'n v. Face*, 239 F.3d 633, 639-40 (4th Cir.), *cert. denied*, 534 U.S. 823 (2001); *Shinn v. Encore Mortgage Servs., Inc.*, 96 F. Supp. 2d 419, 424 (D.N.J. 2000).

[4/] *E.g., Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.11 (1984).

[5/] *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (holding that an agency may rescind a promulgated rule and "recogniz[ing] that [regulatory] agencies do not establish rules of conduct to last forever and that an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances."); *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (ruling that "agency may flatly repudiate [prior] norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy."); *see also Rust v.*

recognized,[6/] its withdrawal of its 1996 regulation, uniformly upheld in the courts as permissible under the Parity Act, did not retroactively invalidate its earlier interpretation.

2. Petitioners also assert that review is warranted to resolve an alleged conflict between the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") and the Parity Act. They ask the Court to decide that New Jersey's prepayment law was valid, notwithstanding the 1996 OTS regulation, because the Parity Act does not "trump[] the specific reservations of authority to the States in" DIDMCA to regulate mortgage loan terms involving interest. Pet. 6. That issue, however, is not suitable for review because it was not timely raised below.

Petitioner Glukowsky did not mention the DIDMCA in either of the briefs he filed in the New Jersey Supreme Court. The Yuritch petitioners filed only one brief, that in opposition to certification, and they did not allege any preemptive force of the DIDMCA on the Parity Act. It mentioned the DIDMCA only in a single sentence (at page 25), suggesting that the DIDMCA did not apply to prepayment penalties at all: "Moreover, although the [DIDMCA] preempted many State laws affecting first mortgage loans, Congress chose not to preempt laws governing prepayment penalties, a field left

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Sullivan, 500 U.S. 173, 186 (1991); *Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 811 (1978); *American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967).

[6/] *See* Office of Thrift Supervision Notice of Final Rule, Alternative Mortgage Transaction Parity Act; Preemption, 67 Fed. Reg. 60,542, 60,550 (Sept. 26, 2002) (Pet. App. 196-97) ("In this final rule, OTS has selected between two permissible interpretations of AMTPA based upon a reevaluation of the statute. OTS has, in no way, concluded that the 1996 rule changes reflected an impermissible construction of its statute.").

historically to State control."[7/] The New Jersey Supreme Court's decision does not mention the DIDMCA. The first time the New Jersey Supreme Court was presented with the issue was in petitioner Glukowsky's motion for reconsideration, which that court denied without comment. Pet. App. 83. No motion for reconsideration was filed in the Yuritch appeal.

In these circumstances the issue is not suitable for review. Even assuming that petitioners are raising an argument in support of a claim properly presented below, rather than a new claim, this Court regularly declines to decide issues not raised in nor passed on by the court below. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question.").

Moreover, even if the issue had been preserved, review here would not be warranted. If ever there was a conflict between the two statutes, it has disappeared for the future as a result of the promulgation by the OTS of its new regulation under the Parity Act freeing States to enforce their prepayment penalty laws. And, in any case, the two statutes are in fact readily harmonized. Each was enacted to ease the home mortgage credit crunch of the early 1980s. The DIDMCA, in 1980, preempted all State usury laws, many of which had been on the books since the 1800's and were impeding the flow of credit, but authorized the States henceforth to legislate generally on the same subject as they deemed appropriate. 12 U.S.C. § 1735f-7a(b)(4). The subsequently enacted Parity Act of 1982, by contrast, focused more specifically on encouraging the

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[7/] Brief of Plaintiff-Appellant in *Yurich v. Countrywide Home Loans, Inc.*, No. A-002850-02T5, Sup. Ct. App. Div., filed in the New Jersey Supreme Court 1/28/04.

making of alternative mortgage transactions, imposing (in non-opt-out states) a regime of federal regulations deemed necessary by OTS to achieve parity in this area between federally and state chartered lending institutions and so to spur growth in this "essential" type of credit. The former, broader Act's preservation of the right of States to regulate interest and prepayment penalties generally did not mean that Congress did not intend to permit OTS to extend its regulations, allowing prepayment fees, under the later, more specific Act for this subset of mortgage loans.[8/] *See, e.g., Smith v. Robinson*, 468 U.S. 992, 1024 (1984) ("[A] later enacted, more specific statute [may] amend an earlier, more general statute only to the extent of the repugnancy between the two statutes."); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (same); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (same). Petitioners' position would require an illogical finding that the DIDMCA forever enshrined in the States plenary authority over the regulation of certain loan charges, even when a subsequent Congress decided to permit federal regulation of the terms of certain types of mortgage loans.

[8/] As petitioners note (Pet. 6), there are no reported decisions addressing the question whether the DIDMCA overrides the Parity Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

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